

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of	)	
	)	
K. Rupert Murdoch	)	
(Transferor)	)	File No. BTCCT-20050819AAF, <i>et al.</i>
	)	
and	)	
	)	
Fox Entertainment Group	)	
(Transferee)	)	
	)	
Applications for Transfer of Control of	)	
Fox Television Stations, Inc.	)	

**PETITION FOR RECONSIDERATION OF**  
**OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.**  
**AND**  
**RAINBOW/PUSH COALITION**

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## SUMMARY

The Office of Communication of the United Church of Christ, Inc. (UCC) and the Rainbow/PUSH Coalition petition the FCC to reconsider its October 6, 2006 decision to grant a new 24-month temporary waiver of the newspaper/broadcast cross-ownership rule to the Fox Entertainment Group permitting it to own two television stations, WWOR-TV, WNYW(TV), and a daily newspaper, *The New York Post*, all serving the New York metropolitan area.

UCC and Rainbow/PUSH Coalition challenged Fox's acquisition of WWOR-TV and nine other television stations from Chris-Craft in 2000 and unsuccessfully appealed the FCC's decision in July 2001 to allow the acquisition of these stations conditioned on Fox's coming into compliance with the cross-ownership rule within 24-months. Fox never complied with this condition. Instead, without notice to UCC or Rainbow/PUSH Coalition, Fox sought additional waivers from the FCC in September 2004 and again in September 2005.

In this Petition for Reconsideration, UCC and Rainbow/PUSH Coalition argue that the FCC's decision to grant Fox another 24-month waiver for WWOR-TV offends basic due process requirements by failing to give public notice and take public comment on Fox's waiver request.

Moreover, they argue that the FCC's decision is arbitrary and capricious because it is based on incorrect factual assumptions. Further, Fox failed to show, and the FCC failed to find, that Fox met any of the traditional criteria for waiving the newspaper-broadcast cross ownership rule. Specifically, Fox did not demonstrate that it was unable to sell (or able to sell only at an artificially depressed price) either the *Post* or one of the broadcast stations, or that allowing the common ownership would increase the diversity of viewpoints available to the public.

Instead, the Commission identifies two grounds for granting a new waiver for WWOR-TV—(1) to avoid a forced sale at an artificially depressed price ("fire sale") and (2) to ensure

Fox's continued investment in the *Post*. However, neither reason is supported by the record in this case. Since the Commission already gave Fox 24-months to avoid a fire sale in July 2001, Fox has already had five years to avoid a fire sale. Second, even assuming for purposes of argument that cross-ownership is necessary for the continued success of the *Post*, Fox does not make any showing, nor could it, that cross-ownership of two, powerful VHF stations is necessary to the survival of the *Post*.

UCC and Rainbow/PUSH Coalition also argue that the Commission should consider whether Fox's conduct in connection with this proceeding, specifically its failure to comply with the FCC's 2001 order, its lack of candor in its application, and its possible violation of *ex parte* rules, is consistent with the Commission's rules and policies regarding character. The Commission should also address whether WWOR-TV is meeting its obligation to serve the citizens of New Jersey.

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**PETITION FOR RECONSIDERATION**

The Office of Communication of the United Church of Christ, Inc. (UCC), and the Rainbow/PUSH Coalition, by their attorneys, the Institute of Public Representation, and pursuant to 47 U.S.C. §405(a) and 47 C.F.R. §1.106, respectfully petition the Federal Communications Commission (FCC or Commission) to reconsider its decision to grant a new 24-month temporary waiver of the newspaper/broadcast cross-ownership rule (NBCO), 47 C.F.R. § 73.3555(d), to the Fox Entertainment Group to allow it to own WWOR-TV, Secaucus, New Jersey, in conjunction with WNYW(TV), New York, and *The New York Post*.

**BACKGROUND**

On October 6, 2006, the Commission released an order granting a permanent waiver of the NBCO, to allow continued cross-ownership of *The New York Post* and WNYW(TV), and a 24-month temporary waiver to allow the continued cross-ownership of the *Post* and WWOR-TV, Secaucus, New Jersey. In the same order, the Commission approved the transfer of control of

Fox Television Stations, Inc. (FTS) from K. Rupert Murdoch to Fox Entertainment Group, Inc. (FEG).<sup>1</sup>

**A. Fox's Waiver for WNYW(TV)**

The Commission has previously addressed Fox's New York media holdings on several occasions. In 1985, as part of a purchase of seven broadcast television stations from Metromedia Radio and Television, Inc., Fox acquired WNYW(TV). Since Fox already controlled the *Post*, it was required to divest its interest in the newspaper (or WNYW(TV)) within two years in order to comply with the NBCO.<sup>2</sup> In March 1988, Fox sold the *Post* to real estate developer Peter S. Kalikow.<sup>3</sup>

Soon after acquiring the *Post*, however, Mr. Kalikow's financial difficulties led the paper's parent company to declare bankruptcy. Fox requested a permanent waiver of the NBCO so that it could purchase the *Post* and concurrently maintain WNYW(TV). In 1993, the Commission granted the permanent waiver, finding that a permanent waiver promoted diversity, since the *Post* provided an alternative voice in the New York market, and without Fox's investment the newspaper would go out of business.<sup>4</sup>

**B. Fox's Temporary Waiver for WWOR-TV**

After the FCC relaxed the TV duopoly rule in 1999, the following year Fox attempted to acquire ten television stations from Chris-Craft Industries, Inc. One of these stations was WWOR-TV, Secaucus, New Jersey, which is located in the New York Designated Market Area.<sup>5</sup>

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<sup>1</sup> *K. Rupert Murdoch and Fox Entertainment Group, Memorandum Opinion and Order*, FCC Order 06-122, released (Oct. 6, 2006) ("October 2006 Order").

<sup>2</sup> *Metromedia Radio and Television, Inc.*, 102 FCC 2d 1334 (1985), *aff'd*, *Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038 (D.C. Cir. 1987).

<sup>3</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd 14975, 14985 (2001).

<sup>4</sup> *Fox Television Stations Inc.*, 8 FCC Rcd 5341, 5352 (1993).

<sup>5</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd at 14987-89.

In its transfer applications, Fox argued that the 1993 permanent waiver should extend to its acquisition of WWOR-TV, or in the alternative, that it should receive an “interim waiver” until the conclusion of the 2002 Biennial Regulatory Review of the Commission’s Broadcast Ownership Rules.<sup>6</sup>

The United Church of Christ, Rainbow/PUSH Coalition and other organizations representing viewers in the New York City region timely filed a Petition to Deny the Fox Applications with the Commission in October 2000.<sup>7</sup> Among other reasons, UCC and Rainbow/PUSH Coalition opposed the transfer because it violated the NBCO Rule and Fox failed to support its request for a waiver under any of the Commission’s waiver criteria.<sup>8</sup> In particular, UCC *et al.* pointed out that Fox had failed to show that it met any of the Commission’s long-established waiver requirements, including (1) inability to sell the *Post* or one of the stations, (2) forced sale of either entity at an artificially depressed price, (3) inability of the New York City market to support separate ownership, or (4) that enforcement of the cross-ownership rule would disserve the purposes of diversity and economic competition.<sup>9</sup> On the contrary, the Petition noted, “enforcement of the rule here directly supports” both diversity and economic competition.<sup>10</sup> Similarly, in their Reply, UCC and Rainbow/PUSH Coalition reiterated their opposition to Fox’s waiver request noting that “Grant of a waiver would diminish

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<sup>6</sup> *Id.* at 14987.

<sup>7</sup> Petition to Deny by The Office of Communication, Inc. of the United Church of Christ, et al., File Nos. BALCT-20000918ABB, et al., filed Oct. 27, 2000 (“Petition to Deny”).

<sup>8</sup> *See* Petition to Deny, at 10-13.

<sup>9</sup> *See id.* at 10-11.

<sup>10</sup> *Id.* at 11.

both competition and diversity by reducing the number of independently owned television stations and concentrating power in the hands of Fox.”<sup>11</sup>

In July 2001, the Commission rejected Fox’s claim that the 1993 permanent waiver extended to the acquisition of WWOR-TV, pointing out that “a waiver granted under market conditions that exist at a given place and time is not automatically extended to cover new combinations several years later under potentially changed market conditions.”<sup>12</sup> Regarding Fox’s request for an interim waiver predicated on the forthcoming 2002 Biennial Regulatory Review, the Commission noted that “the fact that such a proceeding was on the horizon, would not be sufficient to warrant an interim waiver.”<sup>13</sup> Instead, the Commission granted a “temporary 24-month waiver within which to come into compliance with the” NBCO.<sup>14</sup> The Commission justified the temporary waiver on the grounds that “[a] temporary loss of diversity, if any, in the New York market during this period will be outweighed by the benefits of permitting an *orderly sale* to a qualified buyer committed to preserving the *Post* as a media voice.”<sup>15</sup> The Commission explained that Fox was not required to sell the *Post*, rather, it had the option of divesting either of its two New York television stations, or the *Post*, just as long it came into compliance with the NBCO rules by the expiration of the waiver.<sup>16</sup>

UCC and Rainbow/PUSH Coalition appealed the Commission’s decision to United States Court of Appeals for the D.C. Circuit. Fox intervened and assured the court: “The two-year

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<sup>11</sup> Reply to Joint Opposition of Fox and Chris-Craft by The Office of Communication, Inc. of the United Church of Christ, et al., File Nos. BALCT-2000918ABB, et al., filed Reply Nov. 22, 2000 (“Reply to Joint Opposition”).

<sup>12</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd at 14987.

<sup>13</sup> *Stockholders of Renaissance Communications Corp.*, 13 FCC Rcd 4717, 4718 (1998); *UTV of San Francisco, Inc.*, 16 FCC Rcd at 14988.

<sup>14</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd at 14990.

<sup>15</sup> *Id.* at 14989.

<sup>16</sup> *Id.* at n. 73.



waiver is not a free pass; it is a temporary arrangement crafted by the Commission to allow Fox to time to locate a new buyer for a fragile, money-losing enterprise.”<sup>17</sup>

In an unpublished opinion, the D.C. Circuit affirmed the FCC’s ruling. It found that the FCC had made an adequate public interest finding to approve the transfer, noting that “[a]lthough Fox could not fully complete Form 314 because it required waivers, to the extent that Fox required these waivers, the Commission found that granting temporary waivers would serve the public interest, and, therefore, the acquisition was in the public interest.”<sup>18</sup> The court further found that “the FCC acted well within its discretion in setting the waiver period at 24-months,”<sup>19</sup> given that Appellants had presented no evidence as to why a shorter period would have achieved the same goals. Judge Tatel issued a concurring opinion in which he agreed that the result was required by precedent, but expressed concern that the Commission had converted an obligation to find affirmative public interest benefits into a rule allowing a license transfer “so long as the acquisition (eventually) does no harm.”<sup>20</sup>

The twenty four month waiver expired in July 2003. However, Fox did not come into compliance with the rule as required by the FCC’s order. Nor does it appear that Fox took any effort during the 24 month period to comply. It appears that Fox was counting on the FCC amending the NBCO rule to allow cross-ownership. And in fact, in June 2003, the Commission relaxed the ownership restrictions imposed by the NBCO and replaced the rule with a cross media limit allowing cross-ownership in most markets.<sup>21</sup> However, before the cross media limit took effect, the Third Circuit issued a stay on September 3, 2003, ordering that the old rule

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<sup>17</sup> Brief for the Intervenor Supporting Appellee by Fox Television Stations, Inc., No. 01-1374, filed July 15, 2002 (“Brief for the Intervenor”).

<sup>18</sup> *Office of Communication of the United Church of Christ v. FCC*, 2002 U.S. App. Lexis 23330.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *In the Matter of the 2002 Biennial Regulatory Review*, 18 FCC Rcd 13,620 (2003).

remain in effect pending judicial review.<sup>22</sup> In June 2004, the Third Circuit reversed and remanded the cross media limits, and ordered that the stay remain in place pending its review of the Commission's action on remand.<sup>23</sup> Thus, the NBCO's prohibition against common ownership of a television station and daily newspaper serving the same area has been continuously in effect since its adoption and remains in effect today.

**C. After Failing to Comply with the FCC Order, Fox Asked for More Waivers**

Even after it became clear that the NBCO would remain in effect, Fox still did not comply with the NBCO as required by the Commission's 2001 Order. Instead, on September 22, 2004, Fox filed a document it called "Petition for Modification of Permanent Waiver," requesting the Commission to either permit common ownership of WWOR-TV, WNYW(TV), and the *Post*, or to grant an additional temporary waiver until after the remand of the 2002 Biennial Regulatory Review.<sup>24</sup>

Despite the years of litigation between UCC and Rainbow/PUSH Coalition and Fox over the New York waiver, Fox failed to serve UCC and Rainbow/PUSH Coalition's counsel with a copy of the petition for a waiver for WWOR-TV. Nor did the FCC provide any public notice or seek comment on Fox's September 2004 waiver request.

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<sup>22</sup> *Prometheus Radio Project v. Federal Communications Commission*, 2003 U.S. App. Lexis 18390.

<sup>23</sup> *Prometheus Radio Project v. Federal Communications Commission*, 373 F.3d 372, 435 (2004).

<sup>24</sup> Petition for Modification of Permanent Waiver by Fox Television Stations, Inc., filed September 22, 2004 ("2004 Waiver Request").

Notwithstanding the absence of public notice, Free Press, an organization who became aware of the request, filed an opposition to the petition on April 15, 2005.<sup>25</sup> Free Press's opposition requested that if the Commission did not simply dismiss Fox's waiver petition as requested, it should at least seek public comment on it. Free Press cited UCC and Rainbow/PUSH Coalition's opposition to Fox's original acquisition of WWOR-TV and noted that many members of the public would likely object if they knew about Fox's proposal.<sup>26</sup>

Free Press also argued against the waiver request on both procedural and substantive grounds. Procedurally, Free Press asserted that since Fox previously sought either a permanent waiver or an interim waiver in 2001 and was rejected on both counts, its request constituted an untimely petition for reconsideration. Substantively, Free Press noted that Fox failed to meet any of the prongs of the waiver test.<sup>27</sup> Not only had Fox failed to document any attempts to sell *any* of its New York media properties, but it had failed to present any evidence that divesting either television station or the *Post* would cause any of the media entities to go out of business. Moreover, Fox did not demonstrate that common ownership in this case would increase diversity or competition.

Fox filed a sixteen page "Opposition to Free Press Objection" on May 10, 2005. The Opposition generally reiterated the same arguments from Fox's waiver petition. In addition, Fox

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<sup>25</sup> Letter from Timothy Karr, Campaign Director, Free Press, to Chairman Kevin J. Martin, Federal Communications Commission (Apr. 15, 2005) Free Press Opposition Letter, ("Free Press Opp.").

<sup>26</sup> Free Press Opp. at P.4.

<sup>27</sup> See *Multiple Ownership*, Free Press Opp. at 3-4. *Second Report and Order in Docket No. 18110*, 50 FCC 2d 1046, 1084-85, *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom.* *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("1975 Order").

argues that the Commission should not seek public comment on its latest waiver request “because it would serve no useful purpose.”<sup>28</sup>

While its waiver petition was pending, Fox underwent a corporate restructuring necessitating FCC approval. As a result, in September 2005, Fox filed a Form 315 “transfer of control” application with the Commission.<sup>29</sup> Exhibit 18 provides some background regarding Fox’s prior waivers and repeats arguments made in the 2004 waiver request. Fox also attached a copy of the 2004 waiver request.

The Commission placed Fox’s transfer application on Public Notice on August 30, 2005. The Public Notice gave no indication that Fox was also seeking new waivers of the NBCO for WNYW and WWOR.<sup>30</sup> Nor did Fox serve the transfer application on counsel for UCC and Rainbow/PUSH Coalition. There is no indication that Fox served a copy on Free Press.

#### **D. The FCC Grants Fox More Waivers**

The FCC voted three to two to grant the transfer and the waivers on August 15, 2006. However, the Order was not released for more than seven weeks.<sup>31</sup> The Order references separate statements by Chairman Martin and Commissioner McDowell, as well as dissents by Commissioners Copps and Adelstein. However, as of today, the last day for filing reconsideration of the 2006 Order, no separate or dissenting statements have been released.

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<sup>28</sup> Opposition to Free Press Objection by Fox Television Stations, Inc., filed May 10, 2005 at 18.

<sup>29</sup> FCC Form 315 Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, File No. BTCCT – 20050819AAF.

<sup>30</sup> To discover that Fox’s corporate restructuring included a request for waiver of the cross-ownership rule, someone would have had to pull up the broadcast actions listed in the Commission’s Daily Digest summaries and then see the one line among many of “Broadcast Actions” referring to Fox, and then go to the FCC website and call up the application and then read the appendixes to that application.

<sup>31</sup> Although the Order indicates that it was released on October 6, 2006, a Friday before the Columbus Day weekend, the text did not appear in the Daily Digest for that date. It appeared instead on the Daily Digest for October 10, 2006.

The 2006 Order incorrectly describes Fox's application as "unopposed."<sup>32</sup> It then explains that "[b]ecause the parties seek the authority for this transaction on FCC Form 314, commonly referred to as a 'long-form' application, our review includes a *de novo* review of any multiple ownership waivers held by the transferor."<sup>33</sup> The Order grants the transfer of control, grants a new permanent waiver for WNYW(TV) and the *Post*, and grants a new temporary waiver permitting continued common ownership of WWOR-TV for an additional 24-months.

## **II. PETITIONERS MEET THE CRITERIA FOR REQUESTING RECONSIDERATION.**

Section 405(a) of the Communications Act permits reconsideration by "any other person aggrieved or whose interests are adversely affected" by a Commission decision.<sup>34</sup> The FCC rules provide that:

any...person whose interests are adversely affected by any action taken by the Commission....may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.<sup>35</sup>

UCC and Rainbow/PUSH Coalition are adversely affected by the Commission's decision to grant Fox an additional twenty four month waiver. As demonstrated in the attached Declarations,<sup>36</sup> both UCC and the Rainbow/PUSH Coalition have members who reside within the service area of WWOR-TV and are the intended beneficiaries of the viewpoint diversity that

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<sup>32</sup> October 6, 2006 Order at ¶ 1.

<sup>33</sup> Id. at ¶ 5.

<sup>34</sup> 47 USC §405(a).

<sup>35</sup> 47 C.F.R. §1.106(b)(1)(2005).

<sup>36</sup> See Attachments Exhibit 1 Declarations.

the NBCO rule is designed to promote.<sup>37</sup> The second 24-month extension granted to Fox to operate WWOR-TV harms each organization's members by causing a loss of diverse viewpoints available to them and decreasing competition in the provision of local news. Each group's members are deprived of the opportunity to have a different licensee, perhaps one controlled by minorities or women, making programming decisions about what to air and how to serve the community.

UCC and Rainbow/PUSH Coalition were unable to participate in the earlier stage of this proceeding because the Commission failed to provide public notice and opportunity for public comment on Fox's requested waivers. Nor did Fox serve counsel for Petitioners with either its September 2004 Waiver Petition or its September 2005 Application for Transfer of Control, despite the fact that both organizations had formally opposed the grant of a temporary waiver for WWOR in the first place. Thus, UCC and Rainbow/PUSH Coalition meet the criteria for seeking reconsideration.

### **III. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO GRANT FOX A NEW TEMPORARY WAIVER OF THE NBCO**

The Commission's grant of a new temporary waiver violated basic principles of due process and administrative law because it provided no notice, or opportunity for public comment on Fox's waiver request, was based on erroneous facts, and was not supported by the record. Thus, the Commission should reconsider its decision.

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<sup>37</sup> See *Rainbow/PUSH Coalition Coalition v. FCC*, 396 F.3d 1235, 1239 (D.C. Cir. 2005) (quoting *Rainbow/PUSH Coalition Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003)).

**A. The Commission Violated the APA and Fundamental Principles of Due Process by Failing to Provide Notice and an Opportunity for Comment**

As the Supreme Court has noted, “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>38</sup> Indeed, the APA requires that in adjudications, the “agency shall give all interested parties opportunity for the submission and consideration of facts, arguments . . . or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.”<sup>39</sup>

Here, UCC and Rainbow/PUSH Coalition were parties to the original transfer proceeding. Yet, despite the fact that there was plenty of time for public comment, and it would have served the public interest to solicit comment here, the FCC failed to give interested parties the opportunity to submit facts and arguments for consideration.<sup>40</sup> The Commission’s failure to seek public comment on Fox’s request for a new waiver is a clear abuse of discretion. As a result of not receiving broad public comment, the Commission based its decision on Fox’s self-interested version of the facts, without subjecting any of Fox’s claims that the waiver serves the public interest to input from the public. This is the essence of arbitrary decision making.

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<sup>38</sup> *Mulllane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); See also *Jones v. Flowers*, 126 S.Ct. 1708 (2006).

<sup>39</sup> 5 U.S.C. §554(c). See generally Richard J. Pierce, Sidney A. Shapiro, & Paul R. Verkuil, Administrative Law and Process § 6.4.3b (4<sup>th</sup> ed. 2004); Jerry L. Mashaw, Richard A. Merrill, Peter M. Shane, Administrative Law: The American Public Law System 407 (5<sup>th</sup> ed. 2003).

<sup>40</sup> When Fox sought waivers of the NBCO in 1993, the Commission gave the public the opportunity to comment. *Fox Television Stations Inc.*, 8 FCC Rcd 5341, 5341(1993).

**B. The FCC's Decision to Grant Fox a New Waiver was Based on Incorrect Facts**

Reconsideration is also necessary because the Commission's decision was based on factually incorrect premises. First, the Order states that Fox's application was unopposed, and does not acknowledge that Free Press filed an objection to Fox's waiver petition.<sup>41</sup> Since granting the waivers was essential to approving Fox's transfer request, it is not true that Fox's application was unopposed. Moreover, if the public had notice and opportunity to comment, others would likely have opposed Fox's request as well.

Second, the Order states that "the existing waivers permitting the common ownership of WNYW(TV), WWOR-TV and *The New York Post* were granted primarily to preserve the operation of the newspaper after concluding that the public would benefit from preservation of the newspaper and that competition in the subject market would not be adversely affected."<sup>42</sup> However, as detailed above, this characterization is false. While the Commission granted the 1993 waiver permitting common ownership of WNYW(TV) and the *Post* primarily to preserve the operation of the newspaper,<sup>43</sup> that was not the reason for granting the temporary waiver for WWOR. Instead, as described above, the FCC granted that waiver so that Fox could come into compliance with the NBCO while avoiding a "fire sale."<sup>44</sup>

**C. The FCC's Grant of A New Waiver for WWOR is Arbitrary and Capricious**

The Commission may approve transfers of control only in instances where the transfer serves the public interest.<sup>45</sup> On its face, approving an application that violates FCC rules does

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<sup>41</sup> October 6, 2006 Order ¶1.

<sup>42</sup> *Id.* at ¶7.

<sup>43</sup> *Fox Television Stations*, 8 FCC Rcd 5341, 5345 (1993).

<sup>44</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd at 1490.

<sup>45</sup> 47 U.S.C. § 310(d). *See also Telemundo Inc. v. FCC*, 802 F.2d 513, 517 (D.C. Cir. 1986);



not serve the public interest. Thus, the Commission can only grant Fox's transfer application if it finds that it would serve the public interest to waive the cross-ownership rule. Indeed, the Commission acknowledges that its

review includes a *de novo* review of any multiple ownership waivers held by the transferor. Such a review is required because multiple ownership waivers apply to a particular licensee as constituted at the time the waiver is granted and do not automatically accrue to a new licensee who represents a new ownership combination.<sup>46</sup>

**1. Fox Has Not Shown, Nor does the FCC Find, that it is Entitled to a Waiver Under the Traditional Four-Prong Test for Waivers of the NBCO**

Despite this acknowledgement, the FCC's order lacks any analysis that would support a grant of the WWOR waiver under the traditional four-part test. In adopting the NBCO, the Commission set out four criteria where a waiver would be appropriate: (1) a licensee is unable to sell a station; (2) if the only sale possible would be at an artificially depressed price; (3) the locality cannot support separate ownership and operation of the newspaper and broadcast station; or (4) for whatever reason, the purposes of the rule would be disserved by its application.<sup>47</sup> An applicant seeking a waiver under the fourth exception is obligated to "plead with particularity the facts and circumstances which would support a deviation" from the rule.<sup>48</sup>

The burden is on Fox to show its inability to sell (or sell only at an artificially depressed price) either the *Post* or one of the broadcast stations, yet Fox presented no evidence supporting either contention. In contrast, when the Commission granted Tribune a new temporary waiver of

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*Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 813, 817 (D.C. Cir. 1990); *Microwave Acquisition Corporation v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998).

<sup>46</sup> October 6, 2006 Order at ¶5.

<sup>47</sup> See *Multiple Ownership – Second Report and Order in Docket No. 18110*, 50 FCC 2d 1046, 1084-85, *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

<sup>48</sup> See, e.g., *Angelo State University* 19 FCC Rcd at 24539.

the NBCO to permit common ownership of the *Hartford Courant* newspaper and television station WTXH, the Commission detailed Tribune's multiple attempts at identifying a potential buyer to comply with the NBCO before the expiration of its temporary waiver.<sup>49</sup> Nor did Fox demonstrate that New York, the largest media market in the United States, is incapable of supporting separate ownership of a newspaper and a television station.

In fact, statistics indicate Fox's New York media properties are thriving financially. Figures cited by the Commission actually show that over the past four years, the *Post* has increased its coverage from 5.3% to 7.3% of New York households, coming close to the coverage of *The New York Times* at 8.4%. The *Post* also increased its share of advertising revenues from 4% to 6.3%.<sup>50</sup> In fact, the *Post* is one of the few newspapers in a major market that has increased circulation over the last six months.<sup>51</sup> Similarly, WNYW(TV) is ranked third among New York television stations with 15% of estimated station revenue, while WWOR-TV has 7.3%. WNYW(TV) also has the highest estimated power ratio, which is the ratio of revenue share to audience share, and WWOR-TV has the third highest. Both scores indicate that they each receive a percentage share of the market revenues greater than their local commercial share of the viewing audience.<sup>52</sup>

Finally, the Commission does not find under prong four that the purpose of the NBCO, *i.e.*, promoting diversity and competition is better served by waiving the rule.<sup>53</sup> Clearly, Fox's common control of two powerful VHF television stations, both with local newscasts, and one of

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<sup>49</sup> *Counterpoint Communications*, 20 FCC Rcd 8582 (2005).

<sup>50</sup> October 6, 2006 Order ¶7.

<sup>51</sup> Katharine Q. Seelye, *Newspaper Circulation Falls Sharply*, N.Y. TIMES, Oct. 31, 2006.

<sup>52</sup> BIA FINANCIAL NETWORK, INVESTING IN TELEVISION MARKET REPORT, 2006 Ratings, (2<sup>nd</sup> Ed. 2006).

<sup>53</sup> The primary purpose of the rule is to ensure "diversity in ownership as a means of enhancing diversity in programming services to the public." 1975 Order.

the major New York daily newspapers, reduces the diversity of local news sources available to the residents of the New York metropolitan area. Enforcing the rule would promote diversity by enabling a different owner, possibly even one controlled by minorities or women, to exercise editorial control about what stories to cover and perspectives to present.

## **2. The Commission's Stated Reasons for Granting a New Waiver are Not Supported by the Record**

Instead of applying the traditional four-prong test, the Commission identifies two grounds for granting a new waiver for WWOR-TV—1) to avoid a forced sale at an artificially depressed price (“fire sale”) and 2) to ensure Fox’s continued investment in the *Post*.<sup>54</sup> However, neither reason is supported by the record in this case.

As described above, in July 2001, the Commission already gave Fox 24 months to come into compliance with the NBCO and thus avoid a fire sale. Fox has already had five years to divest one of its properties, more than enough time to avoid a depressed sale. Given Fox’s failure even to try to comply with the Order, and its refusal to even promise that it will make efforts to comply in the near future, the Commission’s claim that a waiver is in the public interest to avoid a fire sale is completely without merit.<sup>55</sup>

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<sup>54</sup> The Commission’s entire analysis of why it granted a new waiver for WWOR-TV consists of only a few sentences in the October 6, 2006 Order ¶8:

In addition, we believe that a temporary waiver of the rule to permit continued ownership of WWOR-TV and The New York Post for 24 months is appropriate and in the public interest. This waiver should provide sufficient certainty to assure that FTS and News Corp. will continue to take appropriate action or expend necessary capital to preserve and expand The New York Post without a concern that it would have to forfeit that investment by closing the newspaper or by a forced sale of a media interest at an artificially depressed price to achieve compliance with the multiple ownership rules. In other words, we will act appropriately to ensure that the very purpose of the rule – to preserve competition and existing service to the public – is not disserved by a forced divestiture under these circumstances in a market more than sufficiently competitive to withstand the harms the rule was designed to prevent.

<sup>55</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd at 14990.

Second, even assuming for purposes of argument that cross-ownership is necessary for the continued success of the *Post*,<sup>56</sup> the Commission's grant of a new permanent waiver for WNYW should provide sufficient support. Fox does not make any showing, nor could it, that cross-ownership of two, powerful VHF stations is necessary to the survival of the *Post*.

**IV. ON RECONSIDERATION, THE COMMISSION SHOULD ADDRESS ADDITIONAL QUESTIONS CONCERNING FOX'S CHARACTER, COMPLIANCE WITH EX PARTE RULES, AND ADEQUACY OF PUBLIC SERVICE**

On reconsideration, the Commission should not only consider input from the public on whether granting Fox a new waiver is in the public interest, but it should consider whether Fox's conduct in connection with this proceeding is consistent with the Commission's rules and policies regarding character. The Commission should also investigate whether Fox violated the *ex parte* rules, and address whether WWOR-TV is meeting its obligations to serve the citizens of New Jersey.

**A. Fox's Conduct Raises Questions about its Character and Fitness as a Licensee**

In deciding whether grant of a license application is in the public interest, the Commission must assess whether the applicant possesses the requisite "character."<sup>57</sup> Character encompasses two central qualities: "reliability" and "truthfulness."<sup>58</sup> Fox's conduct in this and related proceedings suggests that it has been neither reliable nor truthful. The Commission's

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<sup>56</sup> As the Commission itself notes, the competitive position of the *Post* has improved substantially over the past few years. Also, Fox recently purchased a number of smaller local papers in the outer boroughs of the City further consolidating the number of outlets available to citizens who resides in Brooklyn and Queens. See Maria Aspan, *News Corp. Buys Two Groups of Weekly Papers*, N.Y. TIMES, Sept. 28, 2006, at C14.

<sup>57</sup> See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc.; Transferee*, 13 FCC Rcd 21292, 21305 P26 (1998) ("SBC-SNET Order").

<sup>58</sup> *Character Policy Statement*, 102 FCC 2d 1179, 1209 (1986).

policy is “to treat any violation of any provision of the Act, or of our Rules or policies, as possibly predictive of future conduct and, this, as possibly raising concerns over the licensee’s future truthfulness and *reliability*, without further differentiation.”<sup>59</sup>

Refusing to comply with the Commission’s orders illustrates that Fox is an unreliable licensee. As described above, the Commission’s order in July 2001 granted Fox twenty four months to comply with the NBCO to avoid a fire sale. There was no ambiguity in the Commission’s directive. Indeed, on appeal of that order, Fox’s brief explicitly assured the D.C. Circuit that it understood what was required. “The two-year waiver is not a free pass; it is a temporary arrangement crafted by the Commission to allow Fox to time to locate a new buyer for a fragile, money-losing enterprise.”<sup>60</sup> Despite this statement, Fox blatantly disregarded the order and did not come into compliance with the NBCO rule.

Here, Fox is asking for another waiver of the same rule for the same media properties. Nonetheless, the Commission inexplicably fails to mention, much less analyze, the impact of Fox’s failure to comply with the 2001 Order on its qualifications to remain an FCC licensee.

Fox also violated the duty of candor with the Commission. The Commission “has an affirmative obligation to license more than 10,000 radio and television stations in the public interest . . . As a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it need in order to fulfill its statutory mandate.”<sup>61</sup> Every licensee knows that misrepresentations to the Commission are treated as serious offenses. Even slight

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<sup>59</sup> *Id.* at 1210 (emphasis added).

<sup>60</sup> Brief for the Intervenor Supporting Appellee by Fox Television Stations, Inc., No. 01-1374, filed July 15, 2002 (“Brief for the Intervenor”).

<sup>61</sup> *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981); *see also Sea Island Broadcasting Corp.*, 60 F.C.C.2d 146, 148 (1976), *see also* 47 CFR §1.17; Character Policy Statement, 102 FCC 2d at 1228.

misstatements can produce serious consequences, as the Commission may treat even the most insignificant misrepresentation as an event disqualifying a licensee from further consideration.<sup>62</sup> Candor is of such critical importance that the Commission traditionally reserves its harshest sanction, complete termination of a licensee's rights, for instances in which the licensee has demonstrated a "pervasive pattern of misrepresentation ... conjoined with ... *flagrant disregard of the rules*."<sup>63</sup>

On its Form 315, Fox falsely certifies "that the proposed transfer complies with the Commission's . . . cross-ownership rules."<sup>64</sup> In the attached Exhibit 18, Fox states that it was granted a 24-month temporary waiver of the NBCO in 2001 and that in September 2004, it sought an extension of that waiver.<sup>65</sup> However, Fox does not disclose that its September 2004 request was objected to by Free Press. And while Fox attaches a copy of its September 2004 waiver request, it does not attach Free Press' objection, or its own sixteen page opposition to Free Press's objection. This omission of this material fact violates FCC Rule 1.17 and seems to be intended to mislead the Commission. The fact that the Commission characterizes Fox's applications as "unopposed" suggests that it was misled by Fox's lack of candor.

Fox also lacks candor in describing the circumstances in which the FCC previously granted the 24-month waiver. It implies that the FCC granted the 24 month waiver because of the pending proceedings reviewing the NBCO.<sup>66</sup> In fact, the FCC rejected that reason and

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<sup>62</sup> *Id.* at 1210.

<sup>63</sup> *California Public Broadcasting Forum v. FCC*, 947 F.2d 505 (D.C. Cir 1991), *Faulker Radio, Inc.*, 88 F.C.C.2d, 612, 616 (1981) (emphasis added).

<sup>64</sup> FCC 315 ("Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License Question 8(b)").

<sup>65</sup> Ex. 18 at 3-4.

<sup>66</sup> *Id.* at 3 ("At the time, the 24-month waiver seemed to Fox to be more than adequate in duration to permit the Commission to complete proceedings looking toward repeal of the NBCO rule.").

instead granted the temporary waiver to give Fox time to comply with the rule while avoiding a “fire sale.”<sup>67</sup> Thus, on reconsideration, the Commission should examine the impact of Fox’s lack of candor on its fitness to remain a Commission licensee.

**B. The Commission Should Investigate Whether Fox Engaged in Impermissible Ex Parte Communications**

The Commission’s ex parte rules forbid all ex parte presentations to Commission decision-making personnel in “restricted proceedings.” “Restricted proceedings” include “applications for authority under Title III of the Communications Act, and all wavier proceedings (except those directly associated with tariff filings).”<sup>68</sup> Thus, both Fox’s waiver request and its transfer application are restricted proceedings.

This case does not fall under note 1 to §1.208, which allows a party to freely make presentations to the Commission in a restricted proceeding that involves only one party. On April 15, 2005, Free Press became a party to the proceeding when it filed an objection to Fox’s waiver and served the objection on counsel for Fox.<sup>69</sup> Fox acknowledged Free Press’s objection by filing an opposition on May 10, 2005.<sup>70</sup> Thus, once Free Press filed its objection, the ex parte rules prohibited all non-exempt ex parte presentations to Commission decision-making personnel. In fact, Free Press’s objection explicitly provided, “By filing this letter objecting to Fox’s waiver request, Free Press becomes a party as defined in 47 C.F.R. § 1.1202(d) and henceforth, all *ex parte* presentations to or from Commission decision-making personnel are

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<sup>67</sup> *supra* at 4.

<sup>68</sup> 47 C.F.R. § 1.1208.

<sup>69</sup> See 47 C.F.R. § 1.1202(b)(1) and § 1.1208, n.1; *see also Cumulus Licensing Corp.*, 16 FCC Rcd 360, n.7. (2001) (holding that a third party’s objection ended an uncontested transfer application period and set into effect ex parte rules).

<sup>70</sup> Opposition to Free Press Objection.

prohibited under 47 C.F.R. § 1.1208. Free Press has served this letter on counsel for Fox as required by 47 C.F.R. 1.1202(b)(1).”<sup>71</sup>

Nevertheless, it appears that on at least two occasions Fox may have engaged in prohibited ex parte communications with Commission decision-making personnel in violation of these rules. On or about May 30, 2006, Rupert Murdoch personally met with several FCC commissioners and evidently discussed this matter. Moreover, counsel for Fox communicated with staff from at least one Commissioner’s office regarding the substance of the waiver request and the need for prompt action during the summer of 2006. On reconsideration, the Commission should investigate whether Fox violated the ex parte rules and impose appropriate sanctions.

**C. The Commission Should Examine WWOR-TV’s Failure To Fulfill Its Obligation To Serve New Jersey**

On reconsideration, UCC and Rainbow/PUSH Coalition ask that the Commission consider whether a new waiver to allow Fox to continue to operate WWOR-TV serves the public interest in light of WWOR-TV’s failure to meet its special obligations to serve the citizens of New Jersey.

In 1982, RKO, the licensee for WWOR-TV of New York City, was embroiled in a fight to retain its license for the station.<sup>72</sup> Congress passed an amendment requiring the Commission to issue a license to any existing commercial VHF licensee that volunteered to move to a state that was not being served by present licensees.<sup>73</sup> While its license renewal application was still pending, RKO notified the Commission that it agreed “to the reallocation of WWOR-TV from

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<sup>71</sup> Free Press Opp.

<sup>72</sup> Charles B. Goldfarb, *Reallocating Channel 9 from New York City to Secaucus, New Jersey 2* (July 28, 2003) (a Congressional Research Service memo to Senator Frank Lautenberg of New Jersey) (“CRS Memo”). The amendment is codified at 47 U.S.C. § 331.

<sup>73</sup> CRS Memo at 1-2.



New York, New York, to Secaucus, New Jersey.”<sup>74</sup> The Commission ordered the reallocation, granted RKO a new five year license, and dismissed competing applications as moot.<sup>75</sup> In its Order, the Commission made clear that it “expected that the licensee will devote itself to meeting the special needs of its new community (and the needs of the Northern New Jersey area in general).”<sup>76</sup> The Commission recognized the “unique set of circumstances” present in the highly populated and previously unserved area of Northern New Jersey and “expect[ed] RKO to perform a higher degree of service to its Grade B coverage area than is normally required of a broadcast licensee.”<sup>77</sup> The Order indicated that at renewal time, “RKO will be judged by how it has met the obligation to serve the greater service needs of Northern New Jersey.”<sup>78</sup> Subsequently Senator Bill Bradley of New Jersey, the sponsor of the Congressional amendment, stated that the reallocation would mean the license holder would move its studios and offices to New Jersey with the purpose of serving the people of New Jersey.<sup>79</sup>

The licensee of WWOR-TV continues to have a special public interest obligation to the citizens of New Jersey. For license renewal, all television stations in New York and Philadelphia must demonstrate that they maintain a physical presence and news gathering capacity in New Jersey.<sup>80</sup> WWOR-TV has a greater responsibility to serve New Jersey than its New York or Philadelphia counterparts because its primary community of license is northern New Jersey.”<sup>81</sup> As former Chairman Michael Powell indicated in a letter to Senator Frank Lautenberg of New

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<sup>74</sup> CRS Memo at 2.

<sup>75</sup> CRS Memo at 2.

<sup>76</sup> CRS Memo at 3 (quoting Channel 9 Reallocation (WOR-TV), 53 RR 2d 469 (1983)).

<sup>77</sup> CRS Memo at 3 (quoting Channel 9 Reallocation (WOR-TV), 53 RR 2d 469 (1983)).

<sup>78</sup> CRS Memo at 3 (quoting Channel 9 Reallocation (WOR-TV), 53 RR 2d 469 (1983)).

<sup>79</sup> CRS Memo at 3 (citing 128 Cong. Rec. 10946 (daily edition) (Aug. 3, 1982) (remarks of Senator Bradley)).

<sup>80</sup> Michael K. Powell, *Letter to Senator Frank R. Lautenberg* (Apr. 2, 2004). See also CRS Memo at 4.

<sup>81</sup> CRS Memo at 4.